Supreme Court, U.S.
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No. _____

# In The
# Supreme Court of the United States

STEPHANIE GREEN,

*Petitioner,*

v.

OFFICE OF THE SHERIFF'S OFFICE,
CONSOLIDATED CITY OF JACKSONVILLE,

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

JOHN G. CRABTREE
*Counsel of Record*
THE FLORIDA APPELLATE
ALLIANCE, P.L.C.
328 Crandon Boulevard,
Suite 225
Key Biscayne, Florida 33149
(305) 361-3770

JOHN S. MILLS
REBECCA BOWEN CREED
THE FLORIDA APPELLATE
ALLIANCE, P.L.C.
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
*Counsel for Petitioner*

SHANNON MCLIN CARLYLE
THE FLORIDA APPELLATE
ALLIANCE, P.L.C.
20 La Grande Boulevard
The Villages, Florida 32159
(352) 259-8852

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Court held that in employment discrimination cases, the jury may–but need not–infer that an employer intentionally discriminated against the employee if the employee disproves the employer's proffered explanation for its challenged action. This petition presents the following two questions on which the circuits are split:

1. Whether, upon the employee's request, the district court must instruct the jury that it may infer that the employer intended to discriminate if the jury does not believe the employer's explanation for the challenged action (a "pretext" instruction) (5-5 circuit split); and,

2. If so, whether the district court can cure its error in denying the pretext instruction by allowing the employee to argue this inference to the jury (3-1 split).

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## PETITION FOR A WRIT OF CERTIORARI

Stephanie Green respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

Neither the opinion of the United States Court of Appeals for the Eleventh Circuit (App., *infra*, 1-2) nor the decision of the United States District Court for the Middle District of Florida (App., *infra*, 47-50) is reported.

## JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its judgment on January 14, 2005. (App., *infra*, 3.) This Court granted a thirty-day extension of time for filing the petition (to include Monday, May 16, 2005) on April 8, 2005, No. 04A-859. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254 (Supp. 2002).

## STATUTORY PROVISION INVOLVED

The relevant portion of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any

manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (Supp. 2002).

## STATEMENT

Since its landmark decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court has developed a line of cases explaining how an employee can prove an employer's discriminatory intent based solely on circumstantial evidence. *See, e.g., Furnco Const. Corp. v. Waters*, 438 U.S. 567 (1978); *Bd. of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978); *Tx. Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

"With the goal of 'progressively sharpening the inquiry into the elusive factual question of intentional discrimination,'" this line of cases established and clarified a three-step method for "allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases." *Hicks*, 509 U.S. at 506. First, absent direct evidence, the plaintiff must establish a "prima facie" case of discrimination, which creates a legal presumption of discrimination. *Id.* Second, the plaintiff is entitled to a directed verdict if she proves a prima facie case, unless the defendant articulates on the record a non-discriminatory reason for its action. *Id.* at 509. Once the defendant meets the burden of production, the presumption "is rebutted" and "drops from the case."

*Id.* at 507. At that point, the plaintiff then has the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253.

This Court has twice sought to clarify the confusion among the circuits as to the legal significance of proof of "pretext" in discrimination cases; specifically, whether the plaintiff has the burden of proving something more than that the employer's proffered reason was not the true reason. First, in *Hicks*, the Court rejected the "pretext-plus" approach to discrimination analysis, finding instead that "[t]he fact-finder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." 509 U.S. at 511.

Notwithstanding this Court's decision in *Hicks*, some federal courts continued to cling to the "pretext-plus" theory and instead required plaintiffs to introduce additional evidence of the employer's discriminatory motive, even after plaintiffs had satisfied the requirements of a prima facie case and showed that the employer's proffered reasons were pretextual. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 197 F.3d 688, 693-94 (CA5 1999). Thus, this Court granted certiorari to review the Fifth Circuit's decision in *Reeves* and again explained that a jury may conclude that an employer discriminated if it disbelieves the employer's explanation for the challenged action. 530 U.S. 133, 146-49 (2000). *Reeves* did not address whether courts must so instruct jurors.

Coming in the wake of *Hicks* and *Reeves*, this case presents two important questions that this Court has yet

to address: specifically, whether a district court must instruct jurors that a finding of pretext is a basis to infer discrimination; and, if so, whether the failure to give the requested pretext instruction is harmless where the district court allows counsel for the plaintiff to argue pretext to the jurors in closing argument.

### A. The Petitioner's Allegations of Retaliation

The Petitioner, Officer Stephanie Green, a black sheriff's deputy in Jacksonville, Florida, sued her employer, the Jacksonville Sheriff's Office ("JSO"), claiming that JSO had discriminated against her on account of her gender and race and in retaliation for her complaining about allegedly discriminatory treatment, all in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq*. The district court granted summary judgment in favor of JSO on all but the retaliation claim. (App., *infra*, 44-45.)

In rejecting JSO's motion for summary judgment on the retaliation claim, the district court applied the *McDonnell Douglas* framework.[1] (App., *infra*, 7, 40-41.) First, the court found that Officer Green had sufficient evidence to demonstrate a prima facie case of retaliation: (1) she engaged in protected activity, (2) she was subsequently subject to an adverse employment action, and (3) the adverse action was causally related to the protected

[1] The circuits have uniformly applied this framework to retaliation claims under Title VII. *E.g., Eliserio v. United Steelworkers of America Local 310*, 398 F.3d 1071, 1078 (CA8 2005); *Meiners v. Univ. of Kansas*, 359 F.3d 1222, 1229 (CA10 2004); *Calero-Cerezo v. United States Dept. of Justice*, 355 F.3d 6, 26 (CA1 2004); *Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524, 531 (CA7 2003); *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 587 (CA11 2000).

activity. (App., *infra*, 41-43.) Officer Green had engaged in protected activity by complaining to a JSO official that she had been discriminated against on account of her race and gender by her supervisor. (App., *infra*, 41.) She had been disciplined by JSO subsequent to her complaint. (App., *infra*, 42.) And because the investigation leading up to her discipline began within a week of her complaints of discrimination, there was evidence that the two events were causally related. (App., *infra*, 42-43.)

Next, the district court concluded that JSO had satisfied its burden of production by articulating a legitimate, non-discriminatory reason for its actions: JSO claimed that it disciplined Officer Green for misconduct. (App., *infra*, 43.)

Finally, the district court found that Officer Green had sufficient evidence to prove that the explanation proffered by JSO was not the true reason for its disciplinary action. The district court noted that although Officer Green's alleged misconduct occurred before her charge of discrimination, JSO did not seek to investigate or discipline her until shortly after she complained of discrimination. (App., *infra*, 43.) Accordingly, the district court denied summary judgment on Officer Green's claim for retaliation under Title VII, and the case proceeded to a jury trial.

### B. The Jury Instructions and Verdict

At the conclusion of the evidence, Officer Green's counsel asked the district court to give a special "pretext" jury instruction. (App., *infra*, 47-50.) Officer Green sought to inform the jurors that they were permitted, but not required, to infer retaliation if they disbelieved JSO's

reasons for disciplining Officer Green. Plaintiff's Proposed Special Instruction No. 3 states:

> You should consider whether Officer Green's complaints of discrimination by Sergeant Monroe more likely motivated defendant to discipline her or whether defendant's explanation for her discipline is worthy of belief. If you find defendant's reasons for disciplining Officer Green are not worthy of belief, you may infer that defendant acted for the reasons urged by Officer Green.

(App., *infra*, 51-52.)

The district court refused to give the requested instruction, noting that Officer Green's counsel could argue to the jury that the reasons given by JSO in disciplining Officer Green were not worthy of belief, or that the jury could infer that the reasons urged by Officer Green were more likely to be true than JSO's explanation. (App., *infra*, 50.) The district court instead followed the Eleventh Circuit pattern jury instruction for retaliation, which required the plaintiff to "show her protected activity was a substantial motivating cause of the defendant's action," and instructed the jury on the business judgment rule, as adopted by the Eleventh Circuit:

> You should be mindful . . . that the law applicable to this case requires only that an employer not retaliate against an employee because the employee has engaged in statutorily protected activity.
>
> So far as you are concerned in this case, an employer may discipline or otherwise adversely affect an employee for any other reason, good or bad, fair or unfair. . . .

(Eleventh Circuit, Pattern Jury Instructions (Civil Cases) (1999) No. 1.9.3.)

The district court allowed Officer Green's counsel to argue, in closing, that the evidence showed that JSO retaliated against Officer Green for her complaints of discrimination. Counsel summarized the evidence tending to prove that JSO did not initiate its investigation into the allegations of misconduct until after Officer Green complained that her supervisor discriminated against her.

The jury returned a defense verdict. In answering special interrogatories, the jurors found that Officer Green had engaged in statutorily-protected activity, and that JSO had thereafter disciplined her, but that the adverse employment action taken by JSO was not causally related to the statutorily-protected activity. (App., *infra*, 53-54.) The district court entered judgment for JSO. After the district court denied Officer Green's motion for a new trial, she timely appealed to the Eleventh Circuit.

### C. The Court of Appeals' Decision

The Eleventh Circuit affirmed the judgment *per curiam* in an unpublished opinion. (App., *infra*, 1-2.) In another recent decision, *Conroy v. Abraham Chevrolet-Tampa, Inc.*, the Eleventh Circuit acknowledged the existence of a multi-circuit split as to the necessity of a pretext instruction, but concluded that a pretext instruction is not required in an employment discrimination case. 375 F.3d 1228, 1233 (CA11 2004) (citing *Palmer v. Bd. of Regents*, 208 F.3d 969, 975 (CA11 2000)), *cert. denied*, 125 S. Ct. 811 (2004).

## REASONS FOR GRANTING THE WRIT

Even before this Court's decision in *Reeves*, the circuits split over whether pretext instructions are necessary in discrimination cases. Since *Reeves*, the split has become far more severe. As the Eleventh Circuit acknowledged in *Conroy*, its refusal to require a pretext instruction aligned the court with three other circuits, but conflicted with the remaining four circuits that had addressed the question. In upholding the ruling of the district court in this case, the Eleventh Circuit has again reaffirmed its refusal to require pretext instructions. To avoid the confusion that jurors face in interpreting the significance and effect of pretext evidence in discrimination cases, this Court should decide whether a jury instruction on pretext is required and whether counsel's closing argument can serve as an adequate substitute for the jury instruction.

### I. The Circuits Are Split on Whether a Specific Jury Instruction as to Pretext Is Required in a Discrimination Case.

This case presents a clear 5-5 split in the circuits. The Second, Third, Fourth, Fifth, and Tenth Circuits require courts to instruct the jury on pretext. *See Kozlowski v. Hampton School Bd.*, No. 02-1485, 2003 WL 22273073, *9 (CA4 Oct. 3, 2003) (holding that "when the evidence presented at trial creates some likelihood that the jury might disbelieve the legitimate, non-discriminatory reasons given by the employer to justify its actions, then the jury should be instructed on this permissible inference," subject to harmless error review); *Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (CA10 2002) (ruling that "a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they

may–but need not–infer that the employer's true motive was discriminatory"); *Ratliff v. City of Gainesville*, 256 F.3d 355, 364 (finding that "the district court erred in failing to give an inference instruction and [in] holding jurors to a 'pretext plus' standard") (CA5 2001), *reh'g and reh'g en banc denied*, 273 F.3d 1097 (CA5 2001); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 280 (CA3 1998) (concluding that "jurors must be instructed that they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision"); *Cabrera v. Jakabovitz*, 24 F.3d 372, 382 (CA2 1994) (explaining in *dicta* that the jury must be informed that it is "entitled to . . . but need not infer" that the plaintiff's burden has been met if the plaintiff has proved a prima facie case of discrimination and the jurors "disbelieve the defendant's explanation"), *cert. denied*, 513 U.S. 876 (1994); *see also Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 574-79 (CA5 2004) (finding that the district court erred in failing to give the requested pretext instruction and concluding that the error was harmless; although the court followed *Ratliff*, two of the three panel members disagreed with its rationale and urged *en banc* reconsideration).

The remaining five circuits that have addressed the question–the First, Sixth, Seventh, Eighth, and Eleventh Circuits–refuse to require a jury instruction on pretext. *See Williams v. Eau Claire Public Schools*, 397 F.3d 441, 446 (CA6 2005); *Conroy*, 375 F.3d at 1233 (acknowledging circuit split, but following its pre-*Reeves* decision in *Palmer v. Bd. of Regents*, 208 F.3d 969, 975 (CA11 2000), to

conclude that a pretext instruction is not required in an employment discrimination case); *Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786, 789-90 (CA8 2001) (noting circuit split and expressing doubt that the denial of a requested pretext instruction could ever be reversible error); *Fite v. Digital Equip. Corp.*, 232 F.3d 3, 7 (CA1 2000) (expressing its doubt that a pretext instruction could be required, even though the plaintiff had not properly requested the instruction); *Gehring v. Case Corp.*, 43 F.3d 340, 343 (CA7 1994) (describing the requested pretext instruction as "a correct statement of the law," but refusing to require a judge to "deliver instructions describing all valid legal principles," especially when describing a permissible, but not obligatory, inference) (citations omitted), *cert. denied*, 515 U.S. 1159 (1995).

The Ninth and District of Columbia Circuits do not appear to have addressed the issue.

## II. The Circuits Are Also Split on Whether Closing Argument Is Adequate to Prevent the Prejudice that Results from the Denial of the Requested Pretext Instruction.

The circuits also have split on another, related issue: specifically, whether the prejudice that results from the denial of the requested pretext instruction can be avoided if the court allows plaintiff's counsel to argue at closing that the employer's stated reasons for termination or discipline are not credible.

Three of the five circuits that do not require a pretext instruction (the Seventh, Eighth, and Eleventh Circuits) have found–predictably–that closing argument is sufficient to prevent prejudice to the plaintiff. *See Conroy*,

375 F.3d at 1235 (rejecting plaintiff's contention that he was prejudiced by the district court's failure to give the requested pretext instruction, and finding it "significant" that the plaintiff's counsel "made good use of his opportunity to argue pretext to the jury in closing statements"); *Gehring*, 43 F.3d at 343 (noting that because the plaintiff's lawyer "asked the jury to draw this inference" at closing argument, without objection from defense counsel or the court, "[i]nstructions on the topic were unnecessary"); *Moore*, 249 F.3d at 791 (ruling that "[i]f the jury had accepted Moore's pretext arguments it would have been required to find in his favor under the instructions provided by the District Court"; thus, "even if there were instructional error, Moore incurred no prejudice").

In contrast, the Tenth Circuit in *Townsend* rejected any notion that the argument of counsel could "prevent a judge's failure to properly instruct the jury from being error." 294 F.3d at 1241, n.5. The *Townsend* court noted that although counsel "may be relied on to point out facts and suggest reasoning," any expectation that "jurors, aided only by the arguments of counsel, will intuitively grasp a point of law that until recently eluded federal judges" is unreasonable. *Ibid.*

Of the remaining four circuits that require pretext instructions, one other circuit has considered the effect of counsel's closing argument. In *Kanida*, a two-judge panel of the Fifth Circuit analyzed counsel's closing argument–in which "trial counsel was able to present the jury with the inferences they were permitted to make from the evidence"–to find that the district court's failure to give the requested pretext instruction did not "rise to the level of reversible error." 363 F.3d at 579; *see also id.* at 577 & n.7 (noting that the "argument to the jury by plaintiff's

counsel regarding the permissible inference is sufficient when the jury is correctly instructed on the ultimate burden the plaintiff bears").

## III. The Decision of the Court of Appeals Is Incorrect.

The Eleventh Circuit erred in affirming the judgment against Officer Green. In upholding the district court's refusal to give the requested pretext instruction, the Eleventh Circuit must have concluded either that a pretext instruction need not be given, or that any error in failing to give the instruction was harmless because Officer Green's counsel was allowed to make a pretext argument to the jury (or both). That the Eleventh Circuit did not issue an opinion in this case to explicitly reach either holding is not surprising; the court has recently made clear that it follows both principles. *Conroy*, 375 F.3d at 1233. Yet the Eleventh Circuit was wrong in *Conroy*, and it is wrong in this case.

### A. Standard Jury Instructions Are an Inadequate Substitute for a Pretext Instruction.

This Court developed the burden-shifting approach to discrimination cases for important practical and policy reasons. As this Court has explained:

> [T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes.

*Aikens*, 460 U.S. at 716; *see also Hicks*, 509 U.S. at 534 (Souter, J., dissenting) (noting that "[t]he possibility of some practical procedure for addressing what Burdine calls indirect proof is crucial to the success of most Title VII claims, for the simple reason that employers who discriminate are not likely to announce their discriminatory motive"); *id.* at 526 (explaining that "[b]ecause 'Title VII tolerates no racial discrimination, subtle or otherwise,' we devised a framework that would allow both plaintiffs and the courts to deal effectively with employment discrimination revealed only through circumstantial evidence").[2]

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[2] Judge Tjoflat of the Eleventh Circuit has further explained:

> The nature of discrimination suits, however, rendered the traditional framework inadequate to effect fully Congress' intent to eliminate workplace discrimination. A discrimination suit (unlike, for instance, an action for negligence or breach of contract) puts the plaintiff in the difficult position of having to prove the state of mind of the person making the employment decision. Furthermore, unlike some other torts, in which state of mind can be inferred from the doing of the forbidden act, the employer's state of mind cannot be inferred solely from the fact of the adverse employment action – in other words, whereas in an action for battery the defendant's intent to cause harm may be inferred solely from the fact that he was swinging a baseball bat at the plaintiff, an employer's intent to discriminate cannot be inferred solely from the fact that he discharged an individual with a protected personal characteristic.
>
> To make matters somewhat easier for plaintiffs in employment discrimination suits, the Supreme Court developed a presumption that supplemented – but did not replace – the traditional framework.

*Wright v. Southland Corp.*, 187 F.3d 1287, 1289-90 (CA11 1999).

As illustrated by the split among the circuits leading up to this Court's granting of certiorari in both *Hicks* and *Reeves*, federal courts have struggled with the legal significance of a plaintiff's proof of pretext in a discrimination case. Some courts, like the Eighth Circuit in *Hicks*, held that proof of pretext was sufficient to direct a verdict in favor of the plaintiff, while others, like the Fifth Circuit in *Reeves*, held that in the absence of additional evidence of intent, proof of pretext was insufficient to even support a verdict. While this Court has now clarified the significance of proof of pretext to the federal courts, juries will remain in the dark unless they receive the same instruction. Otherwise, confused jurors will continue to misapply the same law that has proven difficult for federal courts to understand, even after repeated guidance from this Court.

Indeed, this Court has emphasized the need for clear jury instructions on the issue of intent to discriminate. *See Hicks*, 509 U.S. at 524 (stating that "[c]larity regarding the requisite elements of proof becomes all the more important when a jury must be instructed concerning them, and when detailed factual findings by the trial court will not be available upon review"). Standard jury instructions do not adequately "inform the jury that it may infer discrimination if it disbelieve[s] the employer's stated reasons for termination." *Conroy*, 375 F.3d at 1237 (Wilson, J., concurring).

Standard instructions on the burden of proof, credibility and impeachment of witnesses, and the use of circumstantial and direct evidence do not ensure that jurors understand the significance of pretext. Even a general instruction that the jury is entitled to make reasonable inferences based on common sense

> does not mean that the jury will know without being told that its disbelief in the employer's proffered reason may be evidence that will support a finding of intentional discrimination.

*Conroy*, 375 F.3d at 1237, n.1 (Wilson, J., concurring);[3] *accord Smith*, 147 F.3d at 280. Indeed, given the extensive case law that has been "dedicated to shaping and refining the discrimination law into its present form," it is "disingenuous to argue that the application of the law is nothing more than a matter of common sense." *Conroy*, 375 F.3d at 1273, n.1 (Wilson, J., concurring); *see also Smith*, 147 F.3d at 280 (ruling that if district courts are not required to instruct jurors as to pretext, then "all our carefully honed language will have been an exercise in irrelevance").

The standard jury instruction on the credibility of witnesses is equally inadequate. Although the credibility instruction allows the jury to disbelieve a particular witness, this instruction "says nothing about what the jury may do or infer once the jurors . . . decide[] to disbelieve the employer's proffered reason." *Conroy*, 375 F.3d at 1273, n.1 (Wilson, J., concurring); *accord Smith*, 147 F.3d at 280.

### B. Closing Argument Is an Inadequate Substitute for a Pretext Instruction.

The Eleventh Circuit implicitly agreed with the district court's reasoning that because Officer Green's

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[3] Unlike the instructions given in *Conroy*, which included a detailed instruction on the jury's ability to draw reasonable inferences from the evidence, the district court in this case simply instructed the jury that "as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions which reason and common sense lead you to make." (Doc. 140, at 11.)

counsel could argue pretext to the jury, there was no need to "institutionalize, so to speak," the inference with an instruction. (App., *infra*, 50.) Yet no comparison can be made between a lawyer's closing argument and the judge's charge.

A lawyer's closing argument is an inadequate substitute for a pretext instruction from a federal judge. *See Townsend*, 294 F.3d at 1241; *see also id.* at 1246-47 (Brorby, J., dissenting) (noting "aggressive closing argument"). This Court has long held that "[t]he influence of the trial judge on the jury is necessarily and properly of great weight, and . . . his lightest word or intimation is received with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894); *see also Conroy*, 375 F.3d at 1237 (noting that "arguments of counsel are an imperfect substitute for explicit instruction provided by the court," but finding that "such arguments mitigated any harm that may have resulted from inadequate jury instruction" in that case) (citing *Starr*). It is unreasonable, then, to "expect that jurors, aided only by the arguments of counsel, will intuitively grasp a point of law that until recently eluded federal judges who had the benefit of such arguments." *Townsend*, 294 F.3d at 1241.

A lawyer's closing argument is especially ineffective as a substitute for a pretext instruction from a federal judge where, as here, that same judge instructed the jury on the elements of retaliation and the business judgment rule. The district court relied on the pattern jury instructions to instruct the jurors on the third element (causation) of retaliation, as follows:

> Now, while it is not necessary for the plaintiff to prove that her statutorily protected activity was the sole or exclusive reason for the defendant's adverse employment action, the plaintiff must show her protected activity was a substantial motivating cause of the defendant's action. That is, that her protected activity made a difference in the defendant's decision.

The district court also instructed the jurors on the business judgment rule, explaining that the law "requires only that an employer not retaliate against an employee because the employee has engaged in statutorily protected activity" and that "an employer may discipline or otherwise adversely affect an employee for any other reason, good or bad, fair or unfair . . . . "

Given these instructions–together with the standard instruction on an employee's burden of proof–the jurors likely had difficulty understanding that the prohibition against considering "any other reason, good or bad, fair or unfair" as evidence of discrimination did not include dishonest reasons, or that the jurors' disbelief of JSO's reasons for disciplining Officer Green could be relied upon as evidence that "her protected activity was a substantial motivating cause of the defendant's action." *See generally* Dorothy Easley, *"Plain English" Jury Instructions: Why They're Still Needed and What the Appellate Community Can Do to Help*, 78 FLA. BAR J. 66, 67-68 (October 2004) (discussing difficulties of jurors in comprehending instructions).

### C. The District Court's Failure to Instruct the Jury on Pretext Prejudiced Officer Green.

The district court's failure to give the requested pretext instruction resulted in significant prejudice to Officer Green. The jury's answers to the special interrogatories illustrate its conclusion that Officer Green essentially proved a prima facie case of retaliation, for the jury found that she suffered an adverse employment action after engaging in protected activity. (App., *infra*, 53-54.) Officer Green introduced evidence to show that JSO initiated its investigations into her alleged incompetence and misconduct–including alleged misconduct dating back two years–only after she complained that her supervisor, Sergeant Monroe, discriminated against her as a black female. JSO introduced conflicting evidence to suggest that it began its investigations before Officer Green ever complained of discrimination, citing an "alarming trend" of incompetence.

This sharp conflict in the evidence required the jury to determine whether to believe the reasons given by JSO for its investigations and discipline of Officer Green. The jury needed guidance in weighing this conflicting evidence. *See Townsend*, 294 F.3d at 1242. Because Officer Green presented ample evidence from which the jury reasonably could have found that JSO's explanations were not worthy of belief, the jury was entitled to the requested pretext instruction. *See ibid.*

## IV. THE QUESTIONS PRESENTED ARE IMPORTANT.

As this Court's decisions in *Hicks* and *Reeves* demonstrate, the question of pretext is one for the jury. *See*

Wiliam J. Vollmer, *Pretext in Employment Discrimination Litigation: Mandatory Instruction for Permissible Inferences?*, 61 WASH. & LEE L. REV. 407, 444 (Winter 2004). The significance of pretext in discrimination cases, however, "has proven too difficult even for federal courts to discern without repeated guidance from the Supreme Court." *Conroy*, 375 F.3d at 1236 (Wilson, J., concurring).

Since *Hicks* and *Reeves*, federal courts have struggled, too, with the question of whether jurors must be instructed as to pretext and when the failure to do so is prejudicial. This struggle is illustrated by the extraordinarily well-developed split among the circuits on this issue. Without this Court's resolution of the circuit split, jurors will continue to experience the same confusion–and to make the same mistakes–as the federal judiciary, even after *Hicks*. *See Conroy*, 375 F.3d at 1236 (Wilson, J., concurring). Thus, this Court should accept certiorari to provide jurors with "clarification on a point of law that has eluded federal courts until quite recently." *Id.* at 1237.

Aside from the confusion that now surrounds the law, the impact of a pretext instruction in employment discrimination cases is significant. One commentator has noted that when jurors are instructed that they may infer discrimination based on pretext, those jurors "consistently find in favor of the plaintiff." Tom Devine, Jr., *The Critical Effect of the Pretext Jury Instruction*, 80 U. DEN. L. REV. 549, 549 (2003). "Inversely, where they are not informed of the inference, they find for the defendant." *Ibid.* Thus, unless the circuit split is resolved, not only will the law not be uniform across the nation, the result in any given case eventually will depend more upon the forum than on the merits of the case.

The extraordinary split among the circuits, together with the continued high volume of employment discrimination cases in federal courts and the impact that the pretext instruction has on those cases, demonstrate the importance of the questions presented. The time has come for this Court to determine whether jurors must be instructed as to pretext in employment discrimination cases and whether the failure to do so is prejudicial.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN G. CRABTREE
*Counsel of Record*
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
328 Crandon Boulevard, Suite 225
Key Biscayne, Florida 33149
(305) 361-3770

SHANNON MCLIN CARLYLE
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
20 La Grande Boulevard
The Villages, Florida 32159
(352) 259-8852

JOHN S. MILLS
REBECCA BOWEN CREED
THE FLORIDA APPELLATE ALLIANCE, P.L.C.
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
*Counsel for Petitioner*

May 16, 2005

## APPENDICES

A. Eleventh Circuit's Opinion ..... App. 1

B. Eleventh Circuit's Judgment ..... App. 3

C. District Court's Order on Motion for Summary Judgment ..... App. 4

D. Excerpt from the November 8, 2002 proceedings, held before the district court ..... App. 47

E. Plaintiff's Proposed Special Instruction No. 3 .. App. 51

F. Verdict ..... App. 53

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 03-13661

D.C. Docket No. 99-00658 CV-J-21-HTS

STEPHANIE GREEN,

Plaintiff-Appellant,

versus

OFFICE OF THE SHERIFF'S OFFICE, CONSOLIDATED CITY OF JACKSONVILLE, a political subdivision of the State of Florida,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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(Filed JANUARY 14, 2005)

Before DUBINA, and FAY, Circuit Judges, and GOLDBERG*, Judge.

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* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) the judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) the judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

United States Court of Appeals
For the Eleventh Circuit

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No. 03-13661

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District Court Docket No.
99-00658-CV-J-21-HTS

STEPHANIE GREEN,

Plaintiff-Appellant,

versus

OFFICE OF THE SHERIFF'S OFFICE, CONSOLIDATED CITY OF JACKSONVILLE, a political subdivision of the State of Florida,

Defendants-Appellees.

---

Appeal from the United States District Court
for the Middle District of Florida

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JUDGMENT

(Filed January 14, 2005)

It is hereby ordered, adjudged, and decreed that the attached 11th Cir. R. 36-1 affirmance without opinion included herein by reference, is entered as the judgment of this Court.

Entered: January 14, 2005
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

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**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

STEPHANIE GREEN,

Plaintiff,

V. CASE NO. 3:99-CV-658-J-21-HTS

OFFICE OF THE SHERIFF'S OFFICE, CONSOLIDATED CITY OF JACKSONVILLE, a political subdivision of the State of Florida,

Defendant,
_____/

**ORDER**

(Filed Oct. 8, 2002)

This cause comes before the Court on Defendant's Motion for Summary Judgment (Dkt. 52)[1] and Plaintiff's

[1] As counsel are aware, Local Rule 3.01(b) limits memoranda in support of a motion to twenty pages in length. Defendant's instant motion meets the letter of that requirement, but only barely, its final sentence falling at the very bottom of page twenty. Sixteen of the motion's twenty pages contain some forty-one footnotes, which in many instances consume one-third or more of the page. (By contrast, this Order runs nearly twice that long, but contains only just over half that many notes.) Far from containing brief asides or indirectly related matters, the notes in Defendant's motion generally contain material facts or substantive law, things that normally appears in a motion's text. But, it is clear that if these notes were incorporated into the text, the motion would well exceed twenty pages. Counsel for Defendant is admonished that such future manipulations of the Local Rule page requirement may result in the Court's sua sponte striking of a document.

Memorandum (Dkt. 61) in opposition thereto, as well as Plaintiff's Motion for Leave to File Second Amended Complaint (Dkt. 60) and Defendant's Objection (Dkt. 68) thereto.

This employment discrimination and retaliation suit is brought by Plaintiff Stephanie Green ("Plaintiff"), a police officer, against her employer, the Office of the Sheriff of the Consolidated City of Jacksonville ("Defendant").

## I. Procedural Background

This action was initiated June 30, 1999, when Plaintiff's prior counsel filed a two-count Complaint (Dkt. 1) against the City and six individual supervisory officers asserting race- and gender-based discrimination, harassment, and retaliation claims under Title VII. Although the exact reasons need not be recited here, Plaintiff's prior counsel was sanctioned by the Court, *see* Dkts. 18, 22, 24, and was later permitted to withdraw from this case. *See* Dkt. 34. Because of previous delays in the case, the Court also vacated its prior scheduling Order. *See id.*

Thereafter, the Court granted Plaintiff's unopposed Agreed Upon Motion For Leave to File Amended Complaint (Dkt. 37) and permitted her to submit her multi-count Amended Complaint (Dkt. 40), which she filed on October 16, 2001. The Amended Complaint dropped all six of the individual defendants but added multiple new counts against the Defendant City. Defendant filed its Answer (Dkt. 41), including its affirmative defenses, thereto on November 1, 2001. Shortly thereafter, the Court entered its Amended Case Management and Scheduling Order (Dkt. 42), inter alia setting June 3, 2002, as the

deadline for completing discovery; August 2, 2002, as the deadline for filing dispositive motions; and November 2002 as the Trial Term.

## II. Summary Judgment Standard

Defendant has filed the instant motion seeking the entry of summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure ("FRCP"). Summary judgment is appropriate only when a court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In making this determination, a court must view all the evidence in the light most favorable to the non-moving party. *See Samples on Behalf of Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). The burden of establishing the absence of a genuine issue is on the moving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). However, the burden extends only to facts that might affect the outcome of the suit under the governing law. "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Once this burden is met, the non-moving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 342. However, a plaintiff need only present evidence from which a jury might return a verdict in his favor in order to survive a summary judgment motion. *See Samples On Behalf of Samples v. City of Atlanta*, 846 F.2d at 1330.

Lastly, as to those claims (e.g., disparate treatment) in which one of several types of analysis (e.g., circumstantial evidence, direct evidence) is possible, the Defendant has addressed such claims of the Plaintiff under the circumstantial evidence analysis derived from the cases of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Cmty, Affairs v. Burdine*, 450 U.S. 248 (1981). Plaintiff has responded in kind. Thus, the Court will only address this analysis in discussing Plaintiff's claims.

## III. Factual Background

### A. Sheriff's Office Hierarchy; Plaintiff's Assignments and Supervision

Plaintiff was hired as a patrol officer by Defendant in mid-1990. For purposes of its Patrol Division, the Office of the Sheriff ("JSO") divides the City into six zones. The St. John's River, which flows north and bisects the City of Jacksonville, separates the three zones that comprise the Patrol East Division from the three that comprise Patrol West Division. Patrol officers are assigned to a zone by a draft-style system and work in squads assigned to a particular shift. Each squad is supervised by a Sergeant who reports to a Watch Commander holding the rank of Lieutenant. Each of the six Watch Commanders per zone report to a Zone Commander holding the rank of Assistant Division Chief ("Asst. Chief"). The six Asst. Chiefs report to their respective Patrol Division Chief ("Chief"). The two Chiefs, one for Patrol Division East and one for Patrol Division West, report to the Undersheriff who reports directly to the Sheriff.

When assigned to the Patrol Division, during the times relevant to this suit (i.e., approximately 1995-1998) Plaintiff was assigned to Zone 3, which encompasses the south-eastern portion of the City. While in Zone 3, she was supervised by Sgt. Michael Monroe, who in turn reported to Lieutenant Jerry Coxen, Jr., who in turn reported to Asst. Chief Justin Hill. During a portion of that time, Asst. Chief Steve Weintraub ("Weintraub") – then a Lieutenant[2] – was the relief Watch Commander for Lieutenant Coxen, and thus a sometimes-supervisor to Sgt. Monroe and, ultimately, Plaintiff.

### B. Sheriff's Office Discipline Generally

According to Undersheriff John Gordon ("Gordon"), the Undersheriff makes decisions regarding serious discipline such as terminations and suspensions, while the decisions regarding lesser forms of discipline are made by supervisors under him, and he is thus generally not aware of such discipline. Gordon further states that there are not any set guidelines for discipline, in that discipline varies in part based on the officer's past behavior. This is part of the JSO's system of progressive discipline, whereby subsequent infractions and misconduct are disciplined based on an officer's prior conduct and misconduct, if any.

According to Lt. Weintraub, charges challenging a patrol officer's competency can be initiated from the

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[2] Some of the individuals involved in this case have been promoted since the relevant events. When one of these individuals is first introduced, their current and former ranks will both be noted, but when such individuals are thereafter referenced by their rank, that reference will be to their prior rank. This should keep the vocabulary of this Order consistent with the record.

bottom up (i.e., by a citizen or a Sergeant) or from the top down (e.g., by a Chief or Asst. Chief). However, in either instance, it is the Lieutenants who wind up investigating the charges. Lieutenants conduct their investigations and determine whether the charges can be sustained or not sustained, but make no further decision and make no recommendation regarding discipline. Rather, the Lieutenants' reports are referred to the applicable Asst. Chief, or higher, at which level a disciplinary decision is made.

### C. Plaintiff's Disciplinary History and Complaints of Discrimination[3]

Plaintiff was disciplined for tardiness on December 28, 1994, by the issuance of a Written Reprimand [Level] I. (Dkt. 52, Comp. Ex. F) (10/6/97 memo from Lt. Weintraub to Asst. Chief Hill).[4]

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[3] The recounting of Plaintiff's disciplinary history is most relevant to the discussion in part V.A., *infra* of Plaintiff's Race and Gender Disparate Treatment claims under Title VII, § 1981, and the FCRA, although this history is also applicable to analysis of certain of Plaintiff's other claims. Where Plaintiff disagrees with a particular alleged instance of misconduct, such is noted.

[4] There are multiple documents in this case, all of which are attached as exhibit to three filings: Defendant's Motion for Summary Judgment (Dkt. 52), its Continuation of Exhibits (Dkt. 53), and Plaintiff's Notice of Filing (Dkt. 62) in support of her opposition. In many cases, multiple documents are compiled into one exhibit to one of these documents without necessarily being sub-identified or distinguished. Likewise most of the deposition exhibits themselves have exhibits. In quite a few instances below, the Court will make reference to one "sub-exhibit" to an exhibit to a docket, and then immediately thereafter reference a different "sub-exhibit" to the same exhibit of the same docket. In order to avoid confusion in these and other similar instances, the Court has frequently repeated the entire citation – including Dkt. # – rather than using the familiar "*id.*"

On July 31, 1995, Plaintiff was again disciplined by the issuance of a Written Reprimand I, this time for being late regarding the completion of a report. (*Id.*)

In October of 1996, Plaintiff took time off work for the funeral of her mother. Upon returning to work, she was disciplined for being A.W.O.L. because she allegedly failed to properly inform her supervisors of and/or submit proper paperwork for that leave. Plaintiff asserts that she submitted the proper paperwork and that, after returning, Sgt. Monroe and Lt. Weintraub unilaterally modified her leave slips. *See generally* Dkt. 52, Ex. D; Dkt. 62, Ex. 1 ¶ 5 (affidavits of Sgt. Monroe and Plaintiff, respectively).

On October 21, 1996, Plaintiff was dispatched to a silent alarm call at a residence. According to the Use of Force Report Plaintiff wrote about the incident, *see* Dkt. 52, Comp. Ex C, upon entering the residence, a dog approached her, she sprayed pepper-spray towards it, and it retreated. As she continued to search the residence, a dog[5] approached her, she saw it out of the corner of her eye, "at which time I instinctively fired my firearm in the direction of what later turned out to be a dog." *See id.* The dog was not harmed, but the homeowner's floor and carpet were damaged. On February 25, 1997, the JSO Firearms Review Board ("Board") reviewed the incident and found Plaintiff's discharge of her weapon to be lawful under the Florida Statutes, but found such discharge not to be within JSO's General Orders and not to be reasonable. *See* Dkt. 52, Comp. Ex. C. Specifically, the Board determined that Plaintiff

[5] It is not clear from the Plaintiff's narrative whether the dog she saw the second time was the same dog she saw the first time.

> did not use sound judgment regarding the use of force by not identifying her target . . . and also subjected her back-up officer and possible innocent persons of the residence to potential serious bodily injuries from the shooting.

*See id.* As a result, the Board directed Plaintiff to immediately "serve in [the] non-line police function [of Teleserve]" – stripping her of her firearm, her right to wear a uniform, her right to drive a take-home patrol car, and her ability to work secondary employment in which police authority was exercised – and directed her to attend remedial firearms training at the Police Academy. *See id.*[6]

### 1. Plaintiff First Complains Formally About Sgt. Monroe

In August of 1997, Plaintiff sought to meet with Director Henry ("Henry"), *see* Dkt. 62, Ex. 1 ¶ 10 (Plaintiff's affidavit), an individual whose position in the JSO hierarchy has not been made completely clear, but who is apparently superior in rank or position to the Patrol Division Chiefs, *see id.*; *see also*, Dkt. 62, Ex. 14 p.30 (deposition of Michael P. Edwards), but still inferior to the Sheriff. During mid- to late-1997, Chief Michael P.

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[6] From the record, it can be gleaned that the Teleserve unit of the JSO uses sworn law enforcement Officers to answer telephone calls from citizens, write certain reports, and handle some non-emergency matters. While Officers can volunteer to work in the Teleserve unit, it appears that the majority of Officers working there are placed there because they have been injured or because of a suspension. Officers working in the Teleserve unit – or, at least, those placed there because of a suspension – are apparently stripped of their badge and gun, not permitted to wear their uniform, and not permitted the use of a patrol car.

Edwards ("Edwards") was the Chief of Patrol West, and Frank Mackesy was the Chief of Patrol East; however, between approximately June to September of 1997, Chief Mackesy was in training at the FBI in Virginia, and thus Edwards also acted as Chief of Patrol East, which encompassed Zone 3, where Plaintiff worked.

According to Chief Edwards, his supervisor – presumably Henry – asked him why Plaintiff had made an appointment with him (Henry), prompting Edwards to summon Plaintiff to his office. *See* Dkt. 62, Ex. 14 p.30. According to Plaintiff, Chief Edwards pressured her not to meet with Henry. *See* Dkt. 62, Ex. 1, ¶ 10. According to Edwards, he merely summoned Plaintiff to his office to see if her complaint was a problem he could solve, as that is one of his functions as a Chief. *See* Dkt. 62, Ex. 14 p.30. He denies telling her not to keep her appointment with Henry. *See id.* at p.31. In any event, Plaintiff did not meet with Henry, and instead met with Edwards on August 26, 27, and 29, 1997, *see* Dkt. 62, Ex. 1, ¶ 9, culminating in her writing out her complaints against Sgt. Monroe on several pages of "Form 4's" (i.e., JSO Interdepartment Correspondence) that she gave to Chief Edwards on August 29, 1997. *See* Dkt. 62, Comp. Ex. 2.

By memo of September 4, 1997, Chief Edwards wrote to Asst. Chief Hill, the Zone 3 Commander, relaying to him Plaintiff's charges against Sgt. Monroe. *See* Dkt. 63, Ex. 14, Ex. 3 thereto. In a letter to Plaintiff dated September 10, 1997, Edwards, inter alia, acknowledged receipt of her Form 4's and stated that Lt. Coxen had been assigned to investigate her complaints. *See* Dkt. 62, Ex. 14, Ex. 1 thereto.

### 2. Plaintiff's 1997 Discipline;[7] Investigation of Her Discrimination Complaint

Around the time that Plaintiff told Edwards of her complaints against Monroe, an investigation into Plaintiff's competency was initiated. Plaintiff makes somewhat contradictory claims about how this investigation began. In one instance, she avers that after she made her complaint to Chief Edwards about Sgt. Monroe, Edwards immediately retaliated against her by assigning Lt. Weintraub to conduct a general investigation of Plaintiff in order to discredit her. *See* Dkt. 62, Ex. 1 ¶ 11 (Plaintiff's affidavit). Yet, in another instance in the same affidavit, Plaintiff avers that, at the conclusion of her three days of meetings with Edwards, he told her, "I'd just like to let you know, we're actually investigating you." *See id.* ¶ 23.

Edwards denies that there was a pending investigation of Plaintiff at that time he met with her, denies directing Weintraub, or anyone else, to investigate Plaintiff in retaliation for her complaints about Monroe, and denies even knowing that Weintraub was investigating Plaintiff. *See* Dkt. 62, Ex. 14 p.32-35 (deposition of Edwards); *but see* Dkt. 62, Ex. 4 p.218 ("And I also instructed Lieutenant Weintraub to conduct an investigation pertaining to the incompetence with Stephanie Green . . . ") (Edwards' prior testimony in arbitration of 1997 discipline). Weintraub avers that he initiated the investigation into Plaintiff based on complaints by Monroe, and that when he commenced that investigation he did not know of plaintiff's complaints about Monroe. *See* Dkt. 52, Ex. F

[7] The three major investigations of Plaintiff, and resulting disciplines, will be referred to by the year that the investigations were initiated.

¶¶ 2-3. In any event, the first dated document referencing the 1997 investigation of Plaintiff that the Court has been able to locate in the record is a portion of the Internal Affairs Master Log. *See* Dkt, 62, Ex. 13 (I.A. Case # 97-536). This entry shows that on September 4, 1997, an unnamed "in-house" complainant[8] made a complaint about "improper action" committed off-duty by Plaintiff. *See id.*

The 1997 discipline involved the following allegations against Plaintiff: (1) failing to seek an arrest warrant from the State Attorney's Office ("SAO") regarding a June 13, 1997, domestic violence incident, instead directing the victims to pursue the matter themselves with the SAO, and then, when later expressly directed by Monroe to seek such a warrant, failing to do so within the time he directed;[9] (2) a related allegation of frequent errors in

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[8] The vast majority of complainants in the portion of the Master Log submitted to the Court are identified only as "in house." Plaintiff claims that the entry shows this charge was assigned by Asst. Chief Hill. *See* Dkt. 62, Ex. 1 ¶ 24. This is not entirely clear from the log, which merely states Hill's name in the column designated "I.A. Invest. Div. Assign." As it is not clear what "Assign" means, it is not clear whether Hill was the person who assigned someone to investigate the Plaintiff or whether Hill was the person assigned by someone else to investigate the Plaintiff.

Except for Plaintiff's efforts to attribute the alleged retaliation against her somewhere further up the chain of command than Sgt. Monroe, the issue of who initiated the investigation of her is somewhat moot. Sgt. Monroe has expressly stated that in the fall of 1997 he informed Lt. Weintraub of his (Monroe's) belief that Plaintiff was acting incompetently (presumably leading to the investigation of Plaintiff). *See* Dkt. 52, Ex. D ¶ 4 (Monroe's affidavit). A version of events with which Lt. Weintraub concurs. Dkt. 52, Ex. F ¶ 2 (Weintraub's affidavit) (recounting how in the fall of 1997 he was informed by Monroe of Plaintiff's alleged incompetent behavior).

[9] Ultimately the SAO determined that there was no reasonable probability of successful prosecution due to the absence of any

(Continued on following page)

Plaintiff's reports; (3) failing timely to complete and/or file a report of a hit-and-run vehicle accident in order to avoid having also to issue the victim a citation for not carrying proof of insurance; (4) failing timely to turn in an alarm citation; and (5) failing to obtain a supervisor's signature on her secondary employment forms between October 1996 and August 1997.

On September 16 and 17, 1997, Weintraub interviewed Plaintiff regarding the charges of incompetency against her. On September 16, 1997, Plaintiff was also permitted to respond to those allegations in writing, which she did through a series of Form 4's addressed to Lt. Weintraub. *See* Dkt. 62, Ex. 15, Ex. 1 thereto.

Also on September 16, 1997, Sgt. Monroe wrote a memo to Lt. Coxen, responding to Plaintiff's complaints of discrimination against him. *See* Dkt. 62, Ex. 14, Plaintiff's Comp. Ex. 3 thereto (September 16, 1997, memorandum from Monroe to Coxen, attached to deposition of Chief Edwards).

On October 1, 1997, Lt. Coxen wrote to Chief Mackesy concluding that Plaintiff's charges of discrimination by Sgt. Monroe were unfounded.

On October 6, 1997, Weintraub wrote a memorandum to Asst. Chief Hill regarding his investigation of the charges against Plaintiff and his conclusion that the charges should be sustained. *See* Dkt. 52, Comp. Ex. F. By

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independent witnesses, the lack of injury, and the victim's request that prosecution not be pursued. *See* Dkt. 62, Comp. Ex. 23 (SAO Disposition Statement dated July 28, 1997). In her affidavit Plaintiff incorrectly asserts that the SAO declined to prosecute due to the lack of any witnesses. *See* Dkt. 62, Ex. 1 ¶ 22.

letter of October or November 25, 1997,[10] Plaintiff was disciplined by a 5% reduction in pay for twenty pay periods. *See* Dkt. 53, Comp. Ex. G. Plaintiff appealed this discipline, the matter was arbitrated, and by an award dated June 4, 1998, the arbitrator upheld the discipline as to Plaintiff's failure to follow Monroe's order regarding the filing of an arrest warrant for the June 13, 1997, domestic violence incident and for failing to do so timely. *See generally* Dkt. 62, Ex. 3. However, the arbitrator overturned the discipline as to the alleged errors in Plaintiff's report writing, her failure to timely file the June 27, 1997, hit-and-run report, her failure to turn in the August 18, 1997, alarm citation, and her failure to obtain a supervisor's signature on secondary employment forms between October 1996 and August 1997. *See id.* As a result, the arbitrator reduced the discipline to a 5% pay reduction for 12 pay periods. *See id.*

### 3. Plaintiff's 1998 Discipline

In or around the close of 1997, it came to light that Plaintiff might have been paid twice for and otherwise failed to properly report to Defendant regarding certain work she performed in a secondary capacity for the Duval County School Board ("DCSB") as part of an anti-truancy

[10] The arbitration award regarding Plaintiff's 1997 discipline states that Plaintiff was disciplined by pay reduction on October 25, 1997. *See* Dkt. 62, Ex. 3 p.2. Elsewhere in the record, is a letter of November 25, 1997, to Plaintiff from Undersheriff Gordon informing her of such discipline. *See* Dkt. 53, Comp. Ex. G. The exact date of Plaintiff's discipline, however, is apparently not a material fact, and the underlying fact that she was so disciplined is not in dispute.

program.[11] There is a conflict in the evidence as to how this investigation was initiated. The JSO Internal Affairs report, later generated, states that an employee of the DCSB initiated the complaint. *See* Dkt. 53, Comp. Ex. G (undated Summation from Det. T.A. Lee to Undersheriff Gordon) (separately marked "Green v. City of Jacksonville Response to Request to Produce 343" to "354" in lower-right corner). The arbitration award ultimately resolving the matter concludes that this investigation was initiated by the Lieutenant who investigated Plaintiff's 1997 discipline, i.e., Lt. Weintraub. *See* Dkt. 62, Ex. 6 p.4. For purposes of this motion, this factual dispute will be resolved, as required by Rule 56, in favor of Plaintiff.

The Internal Affairs report (Dkt. 53, Comp. Ex. G) and the relevant arbitration award (Dkt. 62, Ex. 6) generally agree on the material points of the following facts: Plaintiff and one Officer Pinkney both worked in the DCSB truancy program and, as with many jobs, turned in time sheets reflecting the hours they worked. The DCSB would process these sheets and later mail the Officers a check. During October 1995, the time sheets Plaintiff and Pinkney submitted were apparently lost, and a DCSB employee took another month's time sheet belonging to each employee, altered it to reflect the month of October, and submitted it for payment. Apparently, the original time sheets submitted by the Officers for October 1995 were also later found and processed, and checks therefor were issued to Plaintiff and Pinkney, As a result, Plaintiff and

[11] The record reveals that Officers who have secondary employment in which they use real or implied police authority are required monthly to pay to the JSO a $2.00 fee for each hour so worked.

Officer Pinkney were each paid twice for certain hours worked during October 1995.

When interviewed by Internal Affairs, the DCSB employee responsible for the time sheets at the relevant time alternately said that she would expect the Officers to have been able to determine that they had been paid twice and, later, that she did not know how the Officers could have caught the error. *See* Dkt. 62., Ex. 7 pp.5-6. However, as recounted in the arbitration award, at the arbitration hearing this same DCSB employee testified that she did have a conversation with Plaintiff about payroll problems, although the employee could not recall when she had the conversation or what the particulars were. *See* Dkt. 62, Ex. 6. This was corroborated by Plaintiff's arbitration testimony that she vaguely recalled being informed or learning of a payroll problem, but not the details. *See id.*

Ultimately, Internal Affairs concluded that Plaintiff was put on notice that there was a problem with the October 1995 time sheets and that, if she had maintained better records of the large number of hours she worked such secondary employment, she would have better been able to determine that she was in fact overpaid. *See* Dkt. 53, Comp. Ex. G. Thus, Internal Affairs concluded that Plaintiff violated certain JSO General Orders related to the proper conduct of an officer. *See id.* Lastly, Internal Affairs concluded that Officer Pinkney did not receive the same notice as Plaintiff, as he worked a lesser number of hours than Plaintiff, and thus would not have known of the discrepancy. *See id.*

As a result of this investigation, by letter dated May 27, 1998, Plaintiff was notified that she was to be suspended for thirty days without pay. *See id.* Plaintiff

appealed this discipline, the matter was arbitrated, and by an award dated March 24, 1999, the arbitrator overturned the discipline. *See generally* Dkt. 62, Ex. 6. Specifically, the arbitrator found that Defendant had failed to prove that Plaintiff was timely notified of a discrepancy sufficient to prompt her to verify her time sheets. *See id.* Thus, the arbitrator concluded Defendant could not justify disciplining Plaintiff but not Officer Pinkney.

### 4. Plaintiff's 1999 Discipline

After the 1998 discipline was imposed on Plaintiff (on May 27, 1998), but before it was overturned in arbitration (on March 24, 1999), three additional incidents occurred that led to Plaintiff being informed by letter of February 16, 1999, from Undersheriff Gordon that she was thenceforward suspended without pay and that she was to be terminated. *See* Dkt. [sic] Dkt. 53, Comp. Ex. G. These incidents were: (1) being tardy on August 18, 1998; (2) being tardy on September 22, 1998; and (3) failing to investigate a possible domestic violence incident and permitting a potentially impaired person to drive a motor vehicle.[12]

As the above discloses, shortly after the 1999 discipline charges were brought, the 1998 discipline was resolved in Plaintiff's favor. Accordingly, the basis for the

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[12] Also during this time – specifically on July 19, 1998 – Plaintiff was involved in a traffic crash in which she was apparently at fault, and for which she was formally counseled. *See* Dkt. 53, Comp. Ex. G (February 24, 2000, letter from Undersheriff Gordon to Plaintiff). However, this incident was not included in the February 1999 Notice of Suspension/Termination, but is referenced in the February 2000 letter/agreement finally resolving that discipline.

Defendant's progressive disciplining of Plaintiff – and thus its arguable justification for termination – having been lessened, Defendant reduced the suspension to eight days without pay in return for Plaintiff's agreement not to contest the matter further. *See* Dkt. 53, Comp. Ex. G (February 24, 2000, letter from Undersheriff Gordon to Plaintiff).[13]

## IV. Plaintiff's Amended Complaint (Dkt. 40) and Defendant's Answer (Dkt. 41) Thereto

Plaintiff's Amended Complaint contains the following counts:[14]

- Count I: disparate treatment, the creation of a hostile work environment, and a pattern and practice of discrimination, all on the basis of her race (black) and gender (female), in violation of Title VII;
- Count II: retaliation against Plaintiff for first complaining about, then filing a charge regarding, Defendant's alleged discriminatory practices, in violation of Title VII;

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[13] At least for purposes of this motion, the fact that Plaintiff did not further contest the 1999 discipline renders unnecessary resolution of her contentions that there was no reasonable suspicion to detain and/or no probable cause to arrest the domestic violence suspect, and no ability to further detain these individuals to investigate the matter and determine that the individual who ultimately drove away was validly licensed and not intoxicated.

[14] Where Plaintiff's Amended Complaint expressly refers to a specific statute or statutory section in a count, such is set forth below. Those counts which merely refer to a statute by name (e.g., "Title VII") or otherwise (e.g., "42 U.S.C. § 2000e et seq.") are set forth in such manner. The reasons for this are explained more fully below.

- Count III: discrimination against Plaintiff on the basis of her race, in violation of 42 U.S.C. § 1981;[15]
- Count IV: retaliation against Plaintiff for first complaining about, then filing a charge regarding, Defendant's alleged discriminatory practices, in violation of 42 U.S.C. § 1981;
- Count V: retaliation against Plaintiff for first complaining about, then filing a charge regarding, Defendant's alleged discriminatory practices, in violation of 42 U.S.C. § 2000e-3 and 42 U.S.C. § 1981;
- Count VI: discrimination against Plaintiff in violation of the Florida Civil Rights Act; and
- Count VII: retaliation against Plaintiff for first complaining about, then filing a charge regarding, Defendant's alleged discriminatory practices, in violation of the Florida Civil Rights Act.

Defendant's Answer (Dkt. 41) denies the above allegations and also sets forth its affirmative defenses. Among Defendant's affirmative defenses is the allegation that "conduct committed by public employers is not actionable under 42 U.S.C. § 1981." *See* Dkt. 41 at ¶ 75.

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[15] The language of Counts III and IV paraphrases the language of 42 U.S.C. § 1981(a), which provides, in pertinent part, "all persons . . . shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . . " While the body of Count V does not paraphrase or otherwise reference the above language, the title of said Count expressly refers to "42 U.S.C. § 1981(a)." *See* Dkt. 40 at p.15.

Before proceeding further, it is necessary to discuss the apparent redundancy of Count V of Plaintiff's Amended Complaint. As noted above, Count II alleges a claim for retaliation under Title VII. Although that count does not cite a specific statutory section, it is clearly brought under § 2000e-3(a) of Title VII, which prohibits such retaliation. *See* 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge . . . or participated in any manner in an investigation, proceeding, or hearing under this subchapter."). Count IV alleges a claim for retaliation under 42 U.S.C. § 1981. Such § 1981 retaliation claims are recognized as a type of racial discrimination actionable under section [sic] § 1981(a). *See Andrews v. Lakeshore Rehabilitation Hospital,* 140 F.3d 1405, 1409-13 (11th Cir. 1998) (reviewing history of § 1981 and concluding that post-hiring retaliation claims were generally available).

Thus, upon reaching Count V, the reader is left to ponder how that count is different from Counts II and Count IV. After its own review, the Court cannot determine any distinction. Count V is thus due to be dismissed as duplicative. However, because analyses of Plaintiff's other claims have also highlighted other deficiencies in parts of Count V (i.e., the § 1981 claim), those conclusions are also set forth herein.

Further, while most counts of the Amended Complaint make clear the theory upon which they rely (e.g., Count I asserts, inter alia, race and gender disparate treatment claims), the theories of Counts III and VI are not clear. Count III merely tracks the language of

§ 1981(a) asserting that Defendant denied Plaintiff the right to make and enforce contracts and otherwise enjoy full and equal benefit of all laws. (Because § 1981 claims are limited to race, there is not the same question, as with Count VI below, whether the Count III claim was also intended to be asserted on the basis of gender.) Count VI merely alleges "discrimination" in violation of the Florida Civil Rights Act ("FCRA") without specifying whether such claim is on the basis of race, gender, or otherwise, and without making clear whether the discrimination was in the form of disparate treatment, harassment (i.e., hostile work environment), or otherwise. The Court is not in the business of intuiting a plaintiff's claims from her pleading. But, because it is too late to direct a repleader in order to clarify these claims, the Court will assume that Counts III and Count VI were intended to be asserted on the same bases (i.e., race and gender, where the latter is applicable) and same theories (e.g., disparate treatment, hostile work environment, and pattern and practice discrimination) as the analogous federal claims of Counts I and III.

## V. Discussion

Plaintiff's Amended Complaint is generally constructed in such a way that the same bases and/or theories are shared among many of the counts. For example, Count I asserts Title VII claims of disparate treatment on the bases of both race and gender, Title VII claims of a hostile work environment on the basis of both race and gender, and Title VII claims of pattern and practice discrimination on the basis of both race and gender. (As set forth above, Counts III and VI are presumed to assert the same theories and bases.) Because § 1981 claims are analyzed in the same manner as race claims under Title VII, *see Standard*

*v. A.B.E.L. Servs. Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) ("Both [Title VII and 42 U.S.C. § 1981] have the same requirements of proof and use the same analytical framework. . . . "), and because FCRA race and gender discrimination claims are also analyzed in the same manner as analogous claims under Title VII, *see Brand v. Florida Power Corp.*, 633 So.2d 504, 507-09 (Fla. 1st DCA 1994) (holding that Florida civil rights laws mirrored after federal laws are construed, and claims thereunder analyzed, in accord with the analogous federal laws), the Court will primarily address Plaintiff's claims on their bases and theories, instead of proceeding count by count.

Lastly, for the reasons stated above, *see, supra,* end of part I, the Court will only discuss the *McDonnell-Douglas/ Burdine* analysis in discussing those claims as to which the several types of analyses are possible.

### A. Race and Gender Disparate Treatment Claims – Counts I, III, and VI

In order to establish a Title VII disparate treatment race discrimination claim under a circumstantial evidence analysis, a plaintiff must first establish a prima facie case by showing that: (1) she is a member of a racial minority; (2) that she suffered an adverse employment action; (3) her employer gave favorable treatment to similarly situated employees who were not within the protected class; and (4) she was qualified for her job. *See Holifield v. Reno,* 115 F.3d 1555, 1562 (11th Cir. 1997). The prima facie case for a claim of disparate treatment based on gender differs only as to the first element, which is changed to reflect the plaintiff's gender. *See, e.g., Armstrong v. Flowers Hosp., Inc.,* 33 F.3d 1308, 1314 (11th Cir. 1994).

In either a race or gender disparate treatment claims [sic], if the plaintiff establishes her prima facie case, the defendant must then proffer a legitimate, non-discriminatory reason for its different treatment. *See Holifield* at 1564. If the defendant meets this burden of production, it is then incumbent on the plaintiff to demonstrate that such reason is merely a pretext for discrimination. *See id.*

For purposes of its motion, Defendant has essentially conceded the first, second, and fourth elements of the prima facie case, attacking only the third element: similarly situated comparators. For the reasons set forth below, the Court agrees that Plaintiff cannot meet this third element, and thus that all of her race and gender disparate treatment claims fail. (Accordingly, the Court need not discuss the other two steps in the *McDonnell-Douglas* analysis.)

A plaintiff is required to show that she is "similarly situated in all relevant aspects" to the non-minority employee to whom she seeks to compare herself, *See Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001). In the context of a disparate discipline case, such as the instant case, it is thus necessary to consider whether the Plaintiff and her putative comparators

> are involved in or accused of the same or similar conduct and are disciplined in different ways. The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed.

*Maniccia v. Brown*, 171 F.3d 1364, 1369 (11th Cir. 1999) (quoting prior 11th Cir. precedent) (internal citations omitted). In determining whether a putative comparator is

similarly situated, it is thus necessary to focus on both "the quantity and the quality of the comparator's misconduct." *See id.*[16]

Plaintiff fails on the third element of the prima facie case because she simply has not pointed out any similarly situated comparator. Plaintiff has pointed to several specific instances when she claims that other officers were not disciplined for committing the same infractions or misconduct she committed; however, in each of these instances she has not shown how the other officer was otherwise similarly situated to her. For example, Plaintiff asserts that both she and one Officer Hacksunda were late for roll call on one occasion and that she was disciplined but Hacksunda was not. Regarding her alleged failure to properly account for her secondary employment income, which led to her 1998 discipline, Plaintiff points to Officer Pinkney who was also overpaid by the DCSB but not punished by JSO.

Plaintiff next points to the June 4, 1998, arbitration award upholding the charge that she failed to follow Sgt. Monroe's orders and file for an arrest warrant regarding the June 13, 1997, domestic violence incident and failed to

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[16] In making this latter statement, the *Maniccia* panel states that such comparators must be "nearly identical" in the quantity and quality of their misconduct. *See Maniccia,* 171 F.3d at 1368. Subsequent panels of the Eleventh Circuit have, indirectly, recognized a disagreement between those panels using the "nearly identical" language and those using the "similarly situated" language. *See, e.g., Andersen v. WBMG-42,* 253 F.3d 561, 565 (11th Cir. 2001). This Court's citation of *Maniccia* should not be understood as application of a "nearly identical" standard, but rather a recognition that the *Maniccia* panel's succinct formulation of "the quantity and quality of the comparator's misconduct" is no less a relevant inquiry even when applying the arguably looser "similarly situated" standard, as the Court has done in this case.

do so timely. She then refers to a portion of the Internal Affairs Master Log in the record, which log shows certain abstracted data from investigations of other Officers in 1997, including the name of the Officer accused, the nature of the charge, and the disposition of the case. *See* Dkt. 62, Ex. 13. Plaintiff points to three other Officers against whom the charge of "Failure to File in 72 hrs.," or a similar charge,[17] was logged, and notes that in each case the Officer only received a Formal Counseling. *See* Dkt. 62, Ex. 13 (Internal Affairs Case #'s 97-084, 97-142, 97-298); *cf. id.* (Internal Affairs Case # 97-536) (charge against Plaintiff).

But, at most Plaintiff has only shown that each of these officers committed the same particular infraction she did.[18] In none of these cases has she shown that any of these officers had a comparable history of infractions or disciplinings, or even that any of these officers had any other infractions or disciplinings.

While the Court is not holding that Plaintiff, for example, must produce a comparator with the same number and type of prior disciplinary infractions that she had, she must produce someone more similarly situated

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[17] As to one of Plaintiff's proffered comparator Officers, the log states "fail to file felony charge w/in 72 hours." For purposes of this motion, it will also be assumed that such is an equivalent, if not arguably greater, charge of misconduct as Plaintiff's failure to file a misdemeanor domestic battery charge.

[18] That point, although assumed for purposes of this analysis, is not exactly clear. The 1997 discipline was JSO Internal Affairs case number 97-536, logged as a complaint of "improper action," which, at least facially, is not the same as the charges of "failure to file in 72 hrs." logged against the putative comparator Officers discussed in the text above.

than merely pointing to an individual accused of the same particular misconduct she was charged with in the instance at issue, but about whose disciplinary record nothing else is known. *Cf. Silvera v. Orange County Sch. Bd.,* 244 F.3d at 1262 (finding plaintiff and proposed comparator not similarly situated where, though plaintiff and comparator – who was not fired – each had approximately fifteen-year old sexual offense arrests, plaintiff had additional arrests that were more recent and were violent in nature); *Maniccia v. Brown,* 171 F.3d at 1369 (finding discharged law enforcement officer plaintiff and her proposed comparators not similarly situated where, though at least one of each of comparators was charged with same misconduct as plaintiff, none were charged with four instances of misconduct as was plaintiff). Producing such a comparator from a large pool of co-employees may not be an easy task, but it is still required as part of the prima facie case.

Accordingly, Plaintiff being unable to prove the third element of the prima facie case, the Defendant's motion is due to be granted as to Plaintiff's Title VII race- and gender-based disparate treatment claims in Count I, her § 1981 race-based disparate treatment claim in Count III, and her FCRA race- and gender-based disparate treatment claims in Count VI.

### B. Race and Gender Hostile Work Environment Claims – Counts I, III, and VI

A hostile work environment is a "workplace . . . permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *See Harris v.*

*Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993) (expounding on gender hostile work environment claim).

It is now accepted that conduct and statements creating a work environment hostile to one of the classes protected by Title VII, while not necessarily rising to the level of an adverse employment action, nevertheless constitute a type of the discrimination prohibited by Title VII. *See, e.g., Harris*, 510 U.S. at 21. Moreover, hostile work environment claims are not limited to gender, but can also be asserted on the basis of the plaintiff's race. *See, e.g., Harrison v. Metropolitan Gov't of Nashville and Davidson County,* 80 F.3d 1107, 1118 (6th Cir. 1996).

One of the essential elements of a claim of a sex or race hostile work environment is proof that the harassment complained of was based on the plaintiff's protected status. *See Mendoza v. Borden, Inc.,* 195 F.3d 1238, 1245 (11th Cir. 1999) (setting forth elements of sex-based hostile work environment claim); *Smith v. Mount Sinai Med. Ctr. of Greater Miami. Inc.,* 36 F.Supp.2d 1341, 1346 (S.D. Fla. 1998) (same re race). The Court concludes that Plaintiff fails this element of her hostile work environment claims.[19]

As evidence that she was subjected to a hostile work environment based on her sex and race, Plaintiff relies on all of the many employment actions of which she complains – both those adverse in and of themselves (e.g., suspensions, termination) and those not adverse (e.g., having reports rejected for correction, being "yelled at").

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[19] Because of the Court's conclusions, as set forth below, regarding this, the third, element of Plaintiff's hostile work environment claims, the Court need not set forth and discuss the other elements of such claims.

However, none of these can be in any way linked to either her sex or her race. Rather, the most the Plaintiff can do is to point to evidence (mainly her deposition testimony, that of another officer, and some documents) and argue that male officers and non-black officers were not subjected to the same treatment. In doing so, the Plaintiff has made what seems to be a common error – arguing disparate treatment claim evidence as a hostile work environment claim. *See, e.g., Cowan v. Prudential Ins. Co.,* 141 F.3d 751, 759 (7th Cir. 1998) (noting instance of conflation of the two types of claims).

While the above evidence would be more relevant to a disparate treatment claim, it is insufficient to support a hostile work environment claim. In order for the work environment to be hostile, the harassment must be connected to the plaintiff's protected class status by more than the plaintiff's own subjective belief, whether that evidence is in the form of statements, conduct, or otherwise. *Cf. Oncale v. Sundowner Offshore Servs.,* 523 U.S. 75, 80 (1998) (citing, as example of gender-based hostile work environment, supervisor's use of sex-specific and derogatory terms to employee); *Rodgers v. Western-Southern Life Ins.,* 12 F.3d 668, 671, 675-76 (7th Cir. 1993) (finding race-based hostile work environment claim where supervisor, inter alia, used racial epithet and referred to plaintiff as being one of "[y]ou black guys . . . too . . . dumb to be insurance agents"); *Woods v. Graphic Communications,* 925 F.2d 1195, 1198 (9th Cir. 1991) (same where co-employees told a racial joke and scrawled "KKK" near employee's work area); *Dickerson v. State of New Jersey,* 767 F.Supp. 605, 616 (same where co-employees wrote "KKK" in employee's bathroom); *Sims v. Montgomery County Comm'n,* 766 F.Supp. 1052, 1091 (M.D. Ala. 1991)

(same where, inter alia, supervisor referred to employee's race and color in a derogatory manner and referred to her "black ass" several times); *cf. also Hutchison v. Amateur Elec. Supply, Inc.*, 42 F.3d 1037 (7th Cir. 1994) (finding gender-based hostile work environment claim where supervisor, inter alia, regularly quizzed female employees for details of their sexual relations and openly referred to one female employee as "Ms. Boobs"); *Sanfelice v. Dominicks' Finer Foods, Inc.*, 899 F.Supp. 372, 374, 376 (N.D.Ill. 1995) (same where supervisor kissed, grabbed, and tickled female employees, and made comments about their physical appearance and attributes); *Campbell v. Board of Regents*, 770 F.Supp. 1479, 1486 (D. Kan. 1991) (same where supervisor slapped female plaintiff on her buttocks); *and cf. Torres v. Pisano*, 116 F.3d 625, 632-33 (2d Cir. 1997) (although ultimately rejecting claims on other grounds, finding race- and gender-based hostile work environment claims where supervisor, inter alia, referred to Puerto Rican female employee by crude term for a portion of her anatomy, suggested that she performed sexual acts for money, as well as calling her a "dumb spic" and telling her to stay at home and on welfare like the rest of the "spics").

In this case, the Plaintiff has pointed to no similar evidence in any way linking her alleged hostile work environment to her race or gender. Accordingly, the Defendant's motion is due to be granted as to Plaintiff's Title VII race- and gender-based hostile work environment claims in Count I, her § 1981 race-based hostile work environment claim in Count III, and her FCRA race- and gender-based hostile work environment claims in Count VI.

### C. Pattern and Practice Discrimination Claims – Counts I, III, and VI

In her general allegations and in Count I Plaintiff has alleged that the JSO had a pattern and practice of discriminating against black females. *See, e.g.*, Dkt. 41 ¶¶ 12, 35 (resp.).[20] As Defendant notes, a "pattern and practice" theory under Title VII requires the Plaintiff to "prove, normally through a combination of statistics and anecdotes that discrimination is the 'standard operating procedure.'" *See E.E.O.C. v. Joe's Stone Crab. Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000) (citing *International Bhd. of Teamsters v. United States,* 431 U.S. 324 (1977), and *Mozee v. American Commercial Marine Servs. Co.,* 940 F.2d 1036 (7th Cir. 1991)). As the *Teamsters* and *Mozee* cases make clear, proof of such intentional discrimination is difficult. The plaintiff must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Teamsters,* 431 U.S. at 336. Often, this is done "though a combination of strong statistical evidence of disparate impact coupled with anecdotal evidence of the employer's intent to treat the protected class unequally." *Mozee,* 940 F.2d at 1051.

In the instant case, the Plaintiff has fallen far short of the mark. Plaintiff's pattern and practice evidence consists of: (1) statistical evidence about the black female population of Duval County and that of the JSO ranks, including supervisory officers; and (2) anecdotal evidence of Retha Smith ("Smith"), a veteran black female JSO officer. This evidence is insufficient, even when viewed

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[20] As noted above, the Court presumes Plaintiff also intended to assert such a claim under her Count III § 1981 and Count VI FCRA claims.

collectively, to establish a pattern and practice of discrimination against black females.

Plaintiff's statistical evidence shows that of the 1569 sworn officers, only 41 are black females, comprising roughly 2.5% of the force. Of the 250 supervisory officers (e.g., Chiefs, Asst. Chiefs, Lieutenants, Sergeants) only 1 is a black female, comprising 0.4% of the force. By contrast, Plaintiff notes that black females comprise 14-15% of the population of Duval County.

Officer Smith is a 28-year veteran of the JSO, is still as active officer, and was the first black female JSO officer. Her anecdotal evidence relates only to herself and mostly hearsay evidence about another black female officer who was one of Smith's contemporaries. Much of that testimony relates to Smith's first ten years as an Officer – approximately 1978-88. Furthermore, Smith states that she has not been in the Patrol Division for the past several years (due to a recent injury and, before that, being in Divisions other than Patrol) and is thus not aware of the climate in the Patrol Division.

Plaintiff's statistical evidence is of questionable relevance. While it might be probative of a failure-to-hire claim or a failure-to-promote claim, the fact that there are disproportionately fewer black female officers and black female supervisory officers in JSO than in the general population of this county is inconclusive as it relates to the discipline and retention of black female officers. Plaintiff's statistical evidence is simply of no moment to the only types of claims she is asserting: disparate treatment and

harassment of a current officer.[21] Likewise, the anecdotal evidence of Officer Smith is simply too paltry to establish a pattern and practice. Beyond herself and one or two other individuals (including the Plaintiff), Officer Smith – as she readily admits – is just not in a position to know of and comment on the careers of any of the other over 1500 JSO officers, or even of all of the 41 black female JSO officers. Accordingly, the Defendant's motion is due to be granted as to Plaintiff's Title VII race and gender pattern and practice discrimination claims in Count I, her § 1981 pattern and practice race discrimination claim in Count III, and her FCRA race and gender pattern and practice discrimination claims in Count VI.

### D. Section 1981 Claims – Counts III and IV

In its summary judgment motion, Defendant argues that Plaintiff's § 1981 claims are procedurally deficient. Plaintiff has presented argument in opposition thereto, but has also simultaneously filed a separate motion seeking leave to amend her Amended Complaint to correct the asserted legal deficiency. Because the request for leave to amend need only be addressed if Defendant is correct in its summary judgment argument, the Defendant's motion will be addressed first.

#### 1. Section 1981 Claims Against Government Entities

Defendant argues that Plaintiff's § 1981 claims fail because, owing to Defendant's status as a state actor, any

[21] Plaintiff does not appear to argue, and the Court strains to see, any relevance of this statistical or anecdotal evidence to her retaliation claims.

violation of § 1981 by Defendant is only remediable through 42 U.S.C. § 1983. For this proposition, Defendant relies on the cases of *Jett v. Dallas Independent School District,* 491 U.S. 701 (1989), and *Butts v. County of Volusia,* 222 F.3d 891 (11th Cir. 2000).

In response, Plaintiff argues that the holding of *Jett* is limited to requiring that the § 1981 liability of municipalities must be founded on official municipal policy and, further, that a violation of § 1981 can still provide a basis for damages against a local government entity. For this assertion, Plaintiff cites the case of *Garner v. Giarrusso,* 571 F.2d 1330, 1337-38 (5th Cir. 1978). Lastly, Plaintiff notes to the Court – and thus appears to invite the Court to follow – the decision in *Federation of African-American Contractors v. Oakland*, 96 F.3d 1204 (9th Cir. 1996), which is in direct conflict with the Eleventh Circuit's decision in *Butts.*

To begin with, the *Garner* case obviously predates *Jett* and is thus of questionable precedential value to the extent one would interpret it contrary to *Jett*. Further, the cited portions of *Garner* only speak generally of a plaintiff's ability to simultaneously pursue Title VII and other federal statutory remedies for discrimination. But that principle does not answer the question of how or through which vehicle a plaintiff properly pursues a § 1981 claim.

More importantly though, as stated by the Eleventh Circuit, the *Jett* case sets forth:

> two guiding principles. First, § 1983 constitutes the exclusive remedy against state actors for violations of the rights contained in § 1981. Second, a plaintiff who sues a municipality under § 1983 for a violation of the rights contained in § 1981 may not rely upon the doctrine of respondeat superior.

*Butts,* 222 F.3d at 893 (citing *Jett*, 491 U.S. at 731-36) (internal citations omitted). In the instant case, as in *Butts,* the Plaintiff has failed to assert her § 1981 claim against the Defendant through § 1983. *See Butts,* 222 F.3d at 894. Lastly, *Butts* expressly recognized and declined to follow the Ninth Circuit's decision in *Federation*. *See Butts,* 222 F.3d at 894. As *Butts* is binding precedent in this Circuit, the Court will follow *Butts*. Accordingly, the Court concludes that Defendant's motion is due to be granted as to Plaintiff's § 1981 claims in Counts III, IV, and V. Thus, the Court will turn its attention to Plaintiff's Motion seeking leave to amend.

### 2. Leave to Amend

Through a separate motion filed contemporaneously with her response to Defendant's summary judgment motion, Plaintiff seeks leave to amend her Amended Complaint to correct the asserted technical deficiency of Counts III, IV, and V, and assert her § 1981 claims against Defendant through § 1983. The Plaintiff has submitted and the Court has reviewed her proposed "Second Amended Complaint," (No Dkt. Num.)[22] Plaintiff asserts that Defendant would not be prejudiced by permitting the filing of the proposed Second Amended Complaint because Defendant has been on notice of the § 1981 claims since the filing of Plaintiff's Amended Complaint on October 6, 2001. Plaintiff's attorney states that he did not understand this technical pleading nuance until it was raised by Defendant's current summary judgment motion. Citing the

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[22] This document, located on left-hand side of Volume I of the case file, is stamped "Received" and bears a date/time stamp September 6, 2002, 2:30 P.M.

familiar standard of *Foman v. Davis,* 371 U.S. 178 (1962), regarding the amendment of pleadings, Plaintiff argues that there has not been an undue delay, bad faith, a dilatory motive, or repeated failure to cure pleading deficiencies. Further, as noted, above, Plaintiff asserts there would be no prejudice to Defendant. Lastly, Plaintiff relies on the case of *Harrison v. Rubin,* 174 F.3d 249 (D.C. Cir. 1999) for the proposition that it would be reversible error for this Court to not permit her requested correction of this assertedly "technical" pleading deficiency.

Noting that the *Jett* case was decided in 1989, Defendant makes what is essentially a delay argument: given that the *Jett* decision well predated Plaintiff's Amended Complaint, counsel for Plaintiff should be presumed to know such authority that so directly impacts § 1981 claims against a public employer. (The same could, of course, be said for *Butts,* which was decided over a year before Plaintiff filed her Amended Complaint herein.)

The remainder of Defendant's arguments focus on the prejudice it assertedly will suffer if Plaintiff is permitted to broaden her claims. Specifically, Defendant contends that, as the discovery and dispositive motion deadlines have passed, it will not be able to conduct discovery regarding these claims or test their legal and/or factual sufficiency by motion. Further, given the short time remaining until trial, and an otherwise full schedule, counsel for Defendant asserts he would not have sufficient time to prepare for trial on a broader scope of claims.

For the reasons set forth below, the Court concludes that Plaintiff's request for leave to amend is due to be denied. First, while Plaintiff presents arguments under Rule 15, Federal Rules of Civil Procedure and the *Foman*

case, and has recognized "that the likelihood of obtaining permission to amend diminishes after this Court's entering of its scheduling order," she has not specifically briefed the issue of good cause under Rule 16 necessary to relieve her of the restrictions of the Court's November 9, 2001, Amended Case Management and Scheduling Order (Dkt. 42). *Cf., e.g., Butts,* 222 F.3d at 892 n.2 (noting that plaintiff therein could not demonstrate good cause to be relieved of trial court's scheduling order).

Second, contrary to the assertions of Plaintiff's counsel that he only just became aware of the asserted pleading deficiency by Defendant's summary judgment motion, the Court would note that Defendant's Answer (Dkt. 41), filed November 1, 2001, contains the affirmative defense that "conduct committed by public employers is not actionable under 42 U.S. C. § 1981." *See* Dkt. 41 at ¶ 75. While not expressly referencing *Jett* or *Butts,* this affirmative defense rather clearly encompasses the basis upon which Defendant has now moved for summary judgment as to Plaintiff's § 1981 claims. Thus, leaving aside the issue of whether counsel for Plaintiff can or should be presumed to have known of the *Jett* and *Butts* cases when he filed Plaintiff's Amended Complaint, Defendant's Answer expressly put Plaintiff on notice that Defendant did not think her § 1981 claims were viable as alleged. Focusing only on Rule 15, the Court concludes that there has thus been a substantial delay of over eight months between Defendant's Answer putting Plaintiff on notice of the asserted deficiency and Plaintiff's recently-filed motion to amend seeking to correct that deficiency. This undue delay supports denial of Plaintiff's instant request.

The Court also finds Defendant's claims of prejudice to be persuasive. As set forth below, the introduction of a § 1983 claim does add additional issues to the case. To allow such an expansion of the claims after the close of discovery and dispositive motions, and such a short time before trial, does too severely limit defense counsel's ability to ready this case for trial. This is particularly so given the large number of claims and theories presented by Plaintiff's Amended Complaint.

Lastly, the Court finds the *Harrison* case cited by Plaintiff to be factually distinguishable. Harrison involved an IRS employee who filed suit under the Americans with Disabilities Act ("ADA"), instead of the Rehabilitation Act. *See Harrison,* 174 F.2d at 251, 252. When the government moved for dismissal/summary judgment on the basis that the ADA did not apply to the plaintiff, she conceded that her citation of the ADA was mistaken and sought leave to amend her pleading to allege the same claim under the Rehabilitation Act. *See id.* at 252. Finding the motion to amend made "too late in the process," the district court in *Harrison* denied it. *See id.* (quoting district court). Because there was no showing of prejudice, only one of delay; because the amendment added no new factual allegations; and because the claims and defenses under the ADA and the Rehabilitation Act are identical, the appellate court held that the district court abused its discretion in denying the plaintiff's motion to amend. *See id.* at 252-53.

While Plaintiff's proposed Second Amended Complaint in this case assiduously adds no new factual allegations, as noted above, Defendant would still be prejudiced. This is so because, unlike in *Harrison,* the interjection of § 1983 into this case would add additional factual and

legal issues. For example, the Plaintiff will have to additionally prove the element that the Defendant acted under color of state law in depriving her of her federal statutory right under § 1981. *See, e.g., Bannum, Inc. v. City of Fort Lauderdale,* 901 F.2d 989, 996-97 (11th Cir. 1990) ("In order to prevail in a civil rights action under section 1983, 'a plaintiff must make a prima facie showing of two elements: (1) that the act or omission deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States, and (2) that the act or omission was done by a person acting under color of law.'"), Further, as *Jett* makes clear, in order for § 1981 liability to attach, Plaintiff must prove that the discrimination she suffered was, in one way or another, the official municipal policy of the Defendant. *See Jett,* 491 U.S. at 732-36. This latter requirement alone would add substantial factual and legal issues to this case as to which Defendant has, reasonably, not previously conducted discovery.

Accordingly, the Court concludes that Plaintiff's Motion for Leave to File Second Amended Complaint (Dkt. 60) is due to be denied.

### E. Retaliation Claims – Counts II and VII

In order to establish a claim of retaliation under a circumstantial evidence analysis under Title VII, a plaintiff must first establish a prima facie case, by showing (1) that she engaged in some statutorily protected activity; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship between the two events. *See Holifield v. Reno,* 115 F.3d 1555, 1566 (11th Cir. 1997). If the plaintiff establishes her prima facie case, the defendant must then proffer a legitimate non-discriminatory

reason for the adverse employment action. *See id.* If the defendant meets this burden of production, it is then incumbent on the employee to demonstrate that such reason is merely a pretext for retaliation. *See id.* The same analysis is applicable to Plaintiff's FCRA retaliation claims. *See Brand,* 633 So.2d at 507-09.[23]

It is not contested that Plaintiff informed a member of Defendant's upper management of her complaints of discrimination against Sgt. Monroe. This is sufficient engagement in a statutorily protected activity – i.e., "opposition" – under § 2000e-3(a), even though no administrative complaint had yet been filed with the EEOC. *See, e.g., Iannone v. Frederic R. Harris, Inc.,* 941 F.Supp. 403, 410 (S.D.N.Y. 1996); *Arzate v. City of Topeka,* 884 F.Supp. 1494, 1503 (D.Kan. 1995); *Cobb v. Anheuser Busch, Inc.,* 793 F.Supp. 1457, 1489-90 (ED. Mo. 1990). Plaintiff thus satisfies the first element.

Defendant asserts that Plaintiff has failed to prove the second element, arguing that Plaintiff's assignment to attend remedial patrol training, including report writing, cannot be considered an adverse employment activity. Defendant also argues that notification to an employee that she is being investigated or will receive an unsatisfactory evaluation also does not constitute adverse

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[23] The same analysis would also be applicable to Plaintiff's § 1981 retaliation claim. However as the Court has previously determined that Plaintiff's § 1981 claims fail otherwise, the Court need not specifically address those claims now. However, because § 1981 claims are analyzed in the same manner as Title VII claims, *see Standard v. A.B.E.L. Servs. Inc.,* 161 F.3d at 1330, were the Court to analyze the § 1981 claims, the same conclusions made hereinafter regarding Plaintiff's Title VII and FCRA retaliation claims would also be applicable to Plaintiff's § 1981 claims.

employment activity. Defendant omits, inter alia, the fact that after complaining about Sgt. Monroe, Plaintiff was formally disciplined and received a reduction in pay (i.e., the 1997 discipline). Such is sufficient to constitute an adverse employment action.[24] Plaintiff thus satisfies the second element for purposes of the instant analysis.

As to the third element, the apparent short time between Plaintiff's complaints and the institution of the investigation that led to the 1997 discipline suggests the existence of a genuine issue regarding the necessary causal relationship. It appears from the record that the investigation leading to the 1997 disciplining of Plaintiff was first initiated on September 4, 1997, less than a week after Plaintiff made known to Defendant's upper management her "opposition" to Sgt. Monroe's treatment of her and her belief that such constituted discrimination. While it is true that the matters investigated as part of that

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[24] Plaintiff alleges that many actions of Defendant constituted adverse employment actions in support of her retaliation claim. *See, e.g.,* Dkt. 62, Ex. 1 ¶¶ 2(a)-(j) (Plaintiff's affidavit in opposition to summary judgment). Because the reduction in pay, which Plaintiff received as a result of the 1997 discipline, is sufficient to constitute an adverse employment action, the Court need not analyze whether the other assertedly adverse actions are, in fact, adverse. However, the Court does pause to note one adverse employment action claimed by Plaintiff that is seemingly at odds with another portion of the record. In her affidavit, Plaintiff states that one of the retaliatory and discriminatory adverse employment actions she suffered was being reassigned to Zone 3 – where she previously worked – after being transferred out of Teleserve and back into Patrol. *See* Dkt. 62, Ex. 1 ¶ 2(j); *see also* Dkt. 62, Ex. 1 ¶15 (stating that Defendant failed and refused to provide Plaintiff an opportunity to transfer to another squad in November 1997). However, in her original complaint of discrimination to Chief Edwards, Plaintiff unequivocally stated she did not want to be transferred or want Sgt. Monroe transferred. *See* Dkt. 62, Comp. Ex. 2 (August 29, 1997 Form 4 from Plaintiff to Edwards at p.3).

discipline all *predated* Plaintiff's charge, the facts taken in a light most favorable to Plaintiff indicate that Defendant did not seek to discipline Plaintiff for those incidents until after she accused Monroe of discriminating against her.

Defendant has offered as its legitimate, nondiscriminatory reason for all adverse actions taken against Plaintiff the assertion that such actions were taken as a part of the ordinary discipline of Officers to ensure that these public servants perform their jobs efficiently and effectively. In particular, Defendant points to Plaintiff's prior disciplinary history and its policy of progressively harsher discipline for each subsequent infraction. Defendant has proffered sufficient evidence – much of which is set forth above in the recounting of Plaintiff's disciplinary history – to satisfy its low burden of production.

In response, Plaintiff has pointed to sufficient evidence to raise a genuine issue of material fact as to whether Defendant's proffered legitimate, nondiscriminatory reason was a pretext for discrimination. Inter alia, the apparent brief time between Plaintiff's complaints about Monroe and the initiation of the investigation leading to the 1997 discipline, as well as the 1998 discipline which was initiated very soon thereafter, sufficiently call into doubt Defendant's proffered reasons. Accordingly, the Defendant's motion is due to be denied as to Plaintiff's Title VII retaliation claim in Count II and Plaintiff's FCRA retaliation claim in Count VII.

### F. Miscellaneous Arguments

#### 1. Disparate Impact Theory

Defendant has presented argument regarding Plaintiff's discrimination claims under a disparate impact

theory. However, Plaintiff does not appear to be asserting such a theory. Accordingly, the Court has not addressed such.

### 2. Exhaustion of Administrative Remedies

Defendant has presented not inconsiderable argument that Plaintiff failed to exhaust her administrative remedies. Plaintiff has presented substantial argument in response, although in a piecemeal fashion not directly responsive to the arguments as presented by Defendant. The resulting difficulty in comparing these arguments, as well as certain disputed issues of material fact, render this issue one inappropriate for summary judgment.[25]

## G. Summation

As to Plaintiff's Count I Title VII race and gender disparate treatment claims, her Count III § 1981 race disparate treatment claim, and her Count VI FCRA race and gender disparate treatment claims, summary judgment is due to be granted in favor of Defendant based on Plaintiff's inability to identify a similarly situated comparator. *See* part V.A.

As to Plaintiff's Count I Title VII race and gender hostile work environment claims, her Count III § 1981 race hostile work environment claim, and her Count VI FCRA race and gender hostile work environment claims, summary judgment is due to be granted in favor of

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[25] These arguments will likely have to be revisited again. However, should that come to pass, the parties will be able to more narrowly focus those arguments on the claims remaining after this Order.

Defendant based on Plaintiff's inability to link any of the alleged harassment to her race or gender. *See* part V.B.

As to Plaintiff's Count I Title VII race and gender pattern and practice discrimination claims, her Count III § 1981 race pattern and practice discrimination claim, and her Count VI FCRA race and gender pattern and practice discrimination claims, summary judgment is due to be granted in favor of Defendant based on the insufficiency of Plaintiff's statistical and anecdotal evidence, *See* part V.C.

As to Plaintiff's Count II Title VII retaliation and Count VII FCRA retaliation claims, summary judgment in favor of Defendant is due to be denied because of the existence of genuine issues of material fact. *See* part V.E.

As to Plaintiff's Count III § 1981 race and gender disparate treatment and hostile work environment claims, her Count IV § 1981 retaliation claim, and her Count V § 1981 retaliation claim, summary judgment is due to be granted in favor of Defendant based on Plaintiff's failure to have asserted such claims properly through § 1983. *See* part V.D.

As to Plaintiff's Count V § 2000e-3(a) and § 1981 retaliation claims, summary judgment is due to be granted in favor of Defendant based on Count V's redundancy of Counts II and IV, respectively. *See* part IV.

Upon consideration of the foregoing, it is hereby **ORDERED**.

1. Defendant's Motion for Summary Judgment (Dkt. 52) is **GRANTED in part** as set forth herein. Otherwise, said motion is **DENIED**.

2. Plaintiff's Motion for Leave to File Second Amended Complaint (Dkt. 60) is **DENIED**. The Clerk shall retain on the left-hand side of the file Plaintiff's proposed "Second Amended Complaint" (No Dkt. Num.) (stamped "Received" and bearing a date/time stamp September 6, 2002, 2:30 P.M.)

**DONE AND ORDERED,** at Jacksonville, Florida, this 8th day of October, 2002.

/s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES
DISTRICT JUDGE

Copies to Counsel of record
[JN] Pro se party

FILE COPY

Date Printed: 10/08/2002

Notice sent to:

__ Stephanie Green
7544 Mossy Rock Circle
Jacksonville, FL 32244

__ Jeffrey Allen Cramer, Esq.
The Cramer Law Firm
1 Independent Dr., #3300
Jacksonville, FL 32202

__ Derrel Quantrill Chatmon, Esq.
Office of General Counsel
St. James Bldg, Suite 480
117 W. Duval St.
Jacksonville, FL 32202

IN THE UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA,
JACKSONVILLE DIVISION

| | |
|---|---|
| STEPHANIE GREEN,<br>Plaintiff,<br>-vs-<br>OFFICE OF THE SHERIFF'S OFFICE, CONSOLIDATED CITY OF JACKSONVILLE, a political subdivision of the State of Florida,<br>Defendant. | Case No. 3:99-cv-658-J-21HTS<br>Jacksonville, Florida<br>November 8, 2002<br>9:06 a.m.<br>Courtroom 2 |

VOLUME 5

TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE RALPH W. NIMMONS, JR.

UNITED STATES DISTRICT JUDGE

and a jury

Court Reporter: L. Marie Splane, RDR, CRR,
Telephone: (904) 549-1310 Fax: 301-6845
Internet: msplane@earthlink.net

[2] COUNSEL FOR THE PLAINTIFF:

JEFFREY A. CRAMER
The Cramer Law Firm
1 Independent Drive, Suite 3300
Jacksonville, Florida 32202

COUNSEL FOR THE DEFENDANT:

DERREL Q. CHATMON and HOWARD M. MALTZ
Office of the General Counsel, City of Jacksonville
117 West Duval Street, Suite 480
Jacksonville, Florida 32202

(Proceedings reported by microprocessor stenography; transcript produced by computer.)

* * *

[166] The next one is B 7.1, duty to deliberate when only the plaintiff claims damages. The actual title that the jury will have will be just "Duty to Deliberate."

The next is B 8, election of foreperson and explanation of verdict form. It's a standard instruction, and I'll give that.

All right. Now, that's all I have.

Now, do you have any additional instructions that you want to urge? And I'll start with Mr. Cramer, the plaintiff.

MR. CRAMER: Yes, Your Honor. We have one which was plaintiff's proposed special instruction 3, and that is known these days as the pretext instruction. And that is, that we believe it's necessary to instruct the jury that if they find the defendant's reasons for disciplining Officer Green are not worthy of belief, that they may infer that the defendant acted for the reasons urged by Officer Green.

There is authority in three circuits for that instruction. The Eleventh Circuit, unfortunately for me, is not one of those, but the Eleventh Circuit has said that it's basically up to the judge whether to give it or not give it. It hasn't said yea or nay. I think it's very important, because the case law says quite clearly that if the defendant's reasons are unworthy of belief, plaintiff can prevail.

[167] And these instructions don't tell the jury that. Unless proposed instruction 3 is given, it really won't be clear to them. I mean, I certainly can argue it, but I don't have any jury instruction to back me up. And I know that this was given last month down in Tampa by Judge

McCoun in a jury trial down there, so it has been given before in this district, at least once.

THE COURT: And that's plaintiff's instruction 3?

MR. CRAMER: Correct, Your Honor.

THE COURT: Just a moment.

Mr. Chatmon?

MR. CHATMON: Yes, sir. The defendant would object to plaintiff's instruction 3. Regarding the retaliation instruction, I believe if read in conjunction with this particular instruction, there will be a conflict. Specifically, in dealing with, at least confusing to the jury, the idea that the impermissible reason was at least a motivating factor.

We just a few moments ago struck – excuse me, spoke of the material and – excuse me, I forgot the other language, but gave the instruction based upon the language that we were previously looking at as being the standard by which the jury should consider the retaliation.

If we now place in this language of the plaintiff regarding pretext, there might be confusion with the jury, [168] and instructions might not – either one of them might not be followed. And I think we run the risk of confusing our jurors in deliberations.

THE COURT: I think this really – I've had this come up before, and I've not given this type of instruction at the request of plaintiffs in employment discrimination cases before. I don't know what the circumstances were in Judge McCoun's case. They may have been very similar, but I'm not of a mind to inject this.

And I think – well, there's no question that this will be a very important part of your argument in summation, Mr. Cramer. But I think that the court need not and should not raise this particular question and institutionalize, so to speak, this argument.

I know that on occasion – in fact, in most employment discrimination cases, I think less experienced attorneys than yourselves have asked for specific instructions on retaliation in the context of the shifting burden, McDonnell-Douglas type of situation.

And, of course, the law in that area is that that's only for the court to utilize that shifting burden standard in evaluating where the case stands during various stages of the trial. But it's not a question for the jury.

Now, I know that what you're requesting is not necessarily controlled by that line of authority, but, [169] rather, you're asking for a specific instruction that emphasizes the question of whether the reason articulated by the defendant in taking its action was worthy of belief or not worthy of belief, and that's up to the – you can argue that. And you can argue that that's an inference, the reasons urged by Officer Green are more likely true.

So I'll deny that request.

Is that all the additional instructions you have?

MR. CRAMER: That's the only one, Your Honor yes.

THE COURT: All right.

* * *

Case 3:99-cv-00658-UA
Filed 10/30/2002



**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

STEPHANIE GREEN,

Plaintiff,

v.

OFFICE OF THE SHERIFF'S OFFICE, CONSOLIDATED CITY OF JACKSONVILLE, a political subdivision of the State of Florida,

Defendant. /

CASE NO.:
3:99-cv-658-J-21HTS

**NOTICE OF SERVING PROPOSED JURY INSTRUCTIONS AND VERDICT FORM**

(Filed Oct. 30, 2002)

Plaintiff Stephanie D. Green, hereby gives notice of serving a copy of her proposed jury instructions and verdict form upon counsel for defendant by hand delivery this 30th day of October, 2002.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Derrel Chatmon, 117 Duval Street,

Jacksonville, Florida 32202, by Hand Delivery, this 30th day of October, 2002

/s/ Jeffrey A. Cramer
Jeffrey A. Cramer
FL Bar No.: 191508
The CRAMER Law Firm
1 Independent Drive, Ste. 3300
Jacksonville, FL 32202
PH: (904) 632-2211
FX: (904) 632-2324
Attorney for Plaintiff

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**PLAINTIFF'S PROPOSED SPECIAL INSTRUCTION NO. 3**

You should consider whether Officer Green's complaints of discrimination by Sergeant Monroe more likely motivated defendant to discipline her or whether defendant's explanation for her discipline is worthy of belief. If you find defendant's reasons for disciplining Officer Green are not worthy of belief, you may infer that defendant acted for the reasons urged by Officer Green.

Authority: *Townsend v. Lumbermens Mutual Casualty Co.*, 29 F.3d 1232 (10th Cir. 2002); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 380-281 [sic] (3d Cir. 1998); *Cabera v. Jakabovitz*, 24 F.3d 372, 382 (2d Cir. 1994). See also, *Palmer v. Board of Regents*, 208 F.3d 969 (11th Cir. 2000).

Given: _____

Modified: _____

Rejected: _____

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

STEPHANIE GREEN,

Plaintiff,

V.

CASE NO.
3:99-CV-658-J-21-HTS

OFFICE OF THE SHERIFF'S OFFICE, CONSOLIDATED CITY OF JACKSONVILLE, a political subdivision of the State of Florida,

Defendant,

_____/

**VERDICT**

(Filed 11-13-2002)

**WE, THE JURY,** unanimously answer the following questions:

**DO YOU FIND THAT THE PLAINTIFF HAS PROVED BY A PREPONDERANCE OF THE EVIDENCE:**

1. That the Plaintiff engaged in statutorily protected activity?

YES _X_ NO ___

[If your answer is Yes, proceed to Question 2.
If your answer is No, you need proceed no further. Have the foreperson sign and date the Verdict Form and return to the courtroom.]

2. That the Defendant thereafter took adverse employment action against the Plaintiff?

YES _X_ NO ___

[If your answer is Yes, proceed to Question 3.
If your answer is No, you need proceed no further. Have the foreperson sign and date the Verdict Form and return to the courtroom.]

3. That the adverse employment action taken by the Defendant was causally related to the Plaintiff's statutorily protected activity?

YES ___ NO _X_

[If your answer is Yes, proceed to Question 4.
If your answer is No, you need proceed no further. Have the foreperson sign and date the Verdict Form and return to the courtroom.]

4. That the Plaintiff suffered damages as a proximate or legal result of the Defendant's adverse employment action?

YES ___ NO ___

[If your answer is Yes, proceed to Question 5.
If your answer is No, you need proceed no further. Have the foreperson sign and date the Verdict Form and return to the courtroom.]

5. That the Plaintiff should be awarded the following amounts to compensate her for:

(a) earnings and fringe benefits lost in the past up to this time?

$ _____

(b) medical care and treatment necessarily obtained in the past or to be so obtained in the future?

$ _____

(c) mental anguish, humiliation, or impairment of reputation suffered in the past or reasonably to be expected in the future?

$ _____

SO SAY WE ALL.

/s/ Phyllis J. Dodge
FOREPERSON

13 Nov. 02
DATED